

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of  
**WISCONSIN COUNCIL 40, AFSCME, AFL-CIO**  
Involving Certain Employees of  
**CITY OF TWO RIVERS**

Case 97  
No. 64843  
ME-4037

**Decision No. 31519-B**

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**Appearances:**

**Michael J. Wilson**, Representative at Large, Wisconsin Council 40, AFSCME, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903 and **Neil D. Rainford**, Staff Representative, Wisconsin Council 40, AFSCME, 1311 Michigan Avenue, Manitowoc, Wisconsin 54220, appearing on behalf of Two Rivers City Hall Employees Union Local 76, Wisconsin Council 40, AFSCME, AFL-CIO.

**Mark L. Olson** and **Daniel J. Chanen**, Davis & Kuelthau, S.C. Attorneys at Law, 111 East Kilbourne Avenue, Suite 1400, Milwaukee, Wisconsin 53202, appearing on behalf of the City of Two Rivers.

**FINDINGS OF FACT, CONCLUSION OF LAW  
AND ORDER CLARIFYING BARGAINING UNIT**

On December 9, 2005, the Wisconsin Employment Relations Commission certified Wisconsin Council 40, AFSCME as the collective bargaining representative of certain employees of the City of Two Rivers. Thereafter, AFSCME and the City were unable to resolve a dispute as to whether Administrative Assistant Sue Wargin was or was not a confidential employee who should continue to be excluded from the newly certified bargaining unit or be included therein.

Hearing as to this dispute was held in Two Rivers, Wisconsin on January 6, 2006 by Commission Examiner Peter G. Davis. The parties thereafter filed written argument, the last of which was received May 30, 2006.

No. 31519-B

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

### **FINDINGS OF FACT**

1. Two Rivers City Hall Employees Union Local 76, Wisconsin Council 40, AFSCME, AFL-CIO, herein AFSCME Local 76, is a labor organization that serves as the collective bargaining representative for an approximately twenty-person bargaining unit, consisting of certain regular full-time and regular part-time employees of City Hall and other related departments, excluding supervisory, managerial, confidential, casual, temporary, and seasonal employees.

2. The City of Two Rivers, herein the City, is a municipal employer providing services to the citizens of the City through its employees. In addition to the AFSCME Local 76 employee bargaining unit, there are three other City employee bargaining units, namely, a fire-fighting employees unit, a law enforcement employees unit, and a public works employees unit. These units consist of approximately seventy City employees. Under the separate employment of the City Library Board, there is also a bargaining unit of Library employees, the formation of which was contemporaneous with the formation of the AFSCME Local 76 unit. The City will bargain with the Library employee bargaining unit on behalf of the Library Board.

3. City Manager Greg Buckley is the head of the bargaining team representing the City in negotiations with the labor organizations representing the five bargaining units identified in Finding of Fact 2. Bargaining sessions generally occur in the vicinity of Buckley's office. In addition, Buckley handles the day-to-day administration of existing City collective bargaining agreements. Buckley's Administrative Assistant, Kim Graves, is a confidential employee who provides most, if not all, of the administrative/clerical assistance required to carry out Buckley's labor relations responsibilities.

In addition to Buckley's Administrative Assistant, the City currently employs three other confidential employees in the following locations: an employee in the Police Department located in a building attached to City Hall; an employee of the Parks and Recreation Department located across the street and one block away from City Hall; and an employee of the Fire Department located approximately one-half mile from City Hall.

4. Richard Schultz is the Finance-Administrative Services Director for the City. He has occupied that position for approximately two years. Schultz's office is located in City Hall, one floor away from the City Manager's office.

In his capacity as Finance-Administrative Services Director, Schultz is a member of the City bargaining team and provides financial analyses relating to bargaining proposals. For the most part, Schultz does not have direct involvement in the day-to-day administration of City collective bargaining agreements.

5. Sue Wargin is Schultz's Administrative Assistant. She has occupied the position of Finance Department Administrative Assistant for approximately 18 years.

The following breakdown describes Wargin's current workload: 30 percent performing accounts payable functions; 15 percent assisting in the preparation of budget and fixed-asset reports; 15 percent maintaining a City filing system; 10 percent handling worker's compensation claims, automobile claims, and general liability claims brought against the City; 10 percent answering the phone and typing correspondence; 5 percent providing assistance to the City Deputy Clerk; and 15 percent performing miscellaneous duties for Schultz and other City departments, including serving as the primary City point of contact for the company that administers drug testing of commercially-licensed City employees.

Wargin has provided limited assistance to Schultz in relation to his labor relations responsibilities. Her current limited but primary exposure to labor relations information results from her duties related to worker's compensation and drug testing.

In the past, Schultz has copied and distributed confidential labor relations documents to members of the City bargaining team for their use in assessing the cost of bargaining proposals. If Wargin is found to be a confidential employee, Schultz will be directing Wargin to copy and distribute these confidential financial documents in the future. Schultz also plans to ask Wargin to proofread such documents in order to verify that the data entered therein is correct. Schultz will continue to have sole responsibility for performing the costing and other analytical functions necessary to prepare the documents.

Although Wargin has not opened mail, typed correspondence or filed material that contained confidential labor relations information, such tasks are part of Wargin's official job duties and would be assigned to Wargin if she is found to be a confidential employee. If City personnel files are moved into the Finance office, Wargin would be responsible for maintaining those files. Further, though she has not been required to do so for five or six years, Wargin's job responsibilities include providing back-up assistance to City Manager Buckley's Administrative Assistant.

Schultz will continue to utilize Wargin as a sounding-board with regard to various labor relations matters that arise in the course of Schultz's work as Finance-Administrative Services Director.

6. Wargin's current and future access to, knowledge of, and participation in confidential labor relations matters is *de minimus* and can be eliminated without undue disruption to the City's operations.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following

**CONCLUSION OF LAW**

The Administrative Assistant to the Finance-Administrative Services Director, Sue Wargin, is not a confidential employee within the meaning of Sec. 111.70(l)(i), Stats., and therefore is a municipal employee within the meaning of Sec. 111.70(l)(i), Stats.

Based on the above and foregoing Findings of Fact and Conclusion of Law, the Commission makes and issues the following

**ORDER CLARIFYING BARGAINING UNIT**

The Administrative Assistant to Finance-Administrative Services Director shall be included in the bargaining unit represented by AFSCME Local 76.

Given under our hands and seal at the City of Madison, Wisconsin, this 14th day of November, 2006.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

Judith Neumann /s/

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Judith Neumann, Chair

Paul Gordon /s/

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Paul Gordon, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

**CITY OF TWO RIVERS**

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSION OF LAW AND ORDER CLARIFYING BARGAINING UNIT**

The question before the Commission is whether Sue Wargin, the Administrative Assistant to the City of Two Rivers Finance-Administrative Services Director is a confidential employee who therefore must continue to be excluded from a recently formed AFSCME Local 76 bargaining unit.

The following legal standard, set forth by the Commission in MINERAL POINT SCHOOL DISTRICT, DEC. NO. 22284-C (WERC, 9/00), and affirmed by the Court of Appeals in MINERAL POINT SCHOOL DISTRICT V. WERC, 251 Wis. 2D 325, 337-338 (Ct. App., 2002), is used when determining whether an individual is a confidential employee:

We have held that for an employee to be held confidential, the employee must have sufficient access to, knowledge of or participation in confidential matters relating to labor relations. For information to be confidential, it must (a) deal with the employer's strategy or position in collective bargaining, contract administration, litigation or other similar matters pertaining to labor relations and grievance handling between the bargaining representative and the employer; and (b) be information which is not available to the bargaining representative or its agents. . . .

While a *de minimis* exposure to confidential materials is generally insufficient grounds for exclusion of an employee from a bargaining unit, . . . we have also sought to protect an employer's right to conduct its labor relations through employees whose interests are aligned with those of management. . . . Thus, notwithstanding the actual amount of confidential work conducted, but assuming good faith on the part of the employer, an employee may be found to be confidential where the person in question is the only one available to perform legitimate confidential work, . . . and, similarly, where a management employee has significant labor relations responsibility, the clerical employee assigned as his or her secretary may be found to be confidential, even if the actual amount of confidential work is not significant, where the confidential work cannot be assigned to another employee without undue disruption to the employer's organization. . . . (Citations omitted.)

We conclude that Wargin is not a confidential employee. Wargin presently performs a *de minimus* amount of confidential labor relations work. The City's plans to alter the manner in which she assists the Finance-Administrative Services Director will not significantly increase the amount of such work because it is the City Manager - not the Services Director - who functions as the *de facto* City Personnel Director. Thus, her exposure to confidential labor relations information will continue to be *de minimus*. Furthermore, we are satisfied that the *de*

*minimus* confidential labor relations work that is performed by or the City wishes to have performed by Wargin could be absorbed by one or more of the four existing confidential City employees without causing undue disruption to City operations. Therefore, Wargin's role as the assistant to a management employee with significant labor relations responsibilities does not warrant her exclusion as a confidential employee.

We proceed to consider the specific contentions of the City.

### **Current Responsibilities**

#### **Worker's Compensation Duties**

The City asserts that, among Wargin's current job duties, it is primarily Wargin's worker's compensation duties that expose her to confidential labor relations information. In relation to those duties, Wargin is described by City Manager Buckley as "chief record keeper" and the "point of contact" with the City's worker's compensation carrier. As such, Wargin files the worker's compensation claims brought against the City, faxes relevant medical records to the carrier, and receives return-to-work slips and independent medical examination reports for filing in the City's worker's compensation files. On one occasion, Wargin contacted the Department of Workforce Development to pose a question, on behalf of the City, relating to a worker's compensation matter.

Wargin's duties, as the chief record keeper of the City's worker's compensation files, expose her to a *de minimus* amount of confidential labor relations information. As noted above, the critical area of inquiry, when we determine an employee's confidential status, is the degree of exposure to the employer's strategy or position in collective bargaining, contract administration, litigation, or other similar matters pertaining to labor relations. We have consistently found that the duty to maintain or access personnel files – including employee evaluations, payroll records, leave or retirement records, medical records, health or life insurance records, or unemployment compensation records – does not result in adequate exposure to an employer's strategy to justify an employee's confidential status. *See, e.g.*, GREEN COUNTY, DEC. No. 31387 (WERC, 7/05), *citing* OCONTO FALLS PUBLIC SCHOOLS, DEC. No. 26815-B (WERC, 5/04); BAYFIELD COUNTY (HIGHWAY DEPARTMENT), DEC. No. 31291 (WERC, 3/05); GILLET SCHOOL DISTRICT, DEC. No. 30755 (WERC, 12/03); CHIPPEWA COUNTY, DEC. No. 10497-A (WERC, 8/97), *citing* OREGON SCHOOL DISTRICT, DEC. No. 28110-C (WERC, 4/96), APPLETON AREA SCHOOL DISTRICT, DEC. No. 22338-B (WERC, 7/87), OUTAGAMIE COUNTY, DEC. No. 14062 (WERC, 10/75); BOARD OF AREA, VOCATIONAL, TECHNICAL AND ADULT EDUCATION, DISTRICT No. 7, DEC. No. 9188 (WERC, 8/69). Such files contain information regarding employees that may be considered confidential in the traditional sense, but they are not confidential in the labor relations sense, because the information contained therein is typically accessible to employees or their unions. GREEN COUNTY, *supra*, CHIPPEWA COUNTY, *supra*. Under the same principle, we find that Wargin's duty to maintain the City's worker's compensation files does not justify her exclusion from the collective bargaining unit. Although the City has pointed out correctly that its worker's

compensation files contain confidential medical records, such records are not confidential in the labor relations sense. To the extent that the City's worker's compensation files contain, as the City also asserts, some information that is not accessible to employees or their unions – such as occasional correspondence from the City's attorney – it is clear that filing such material takes a *de minimus* amount of time.

In arguing that Wargin's worker's compensation duties should confer confidential status, the City relies on CITY OF DE PERE, DEC. NO. 30311 (WERC, 4/02). Our decision, however, to classify the payroll clerk in that case as confidential was based primarily on her significant activities relating to other aspects of collective bargaining, which activities were unrelated to her worker's compensation duties. To the extent that we relied on the clerk's worker's compensation duties, it was significant that she served in a "gatekeeper" capacity for the City, a role in which she recommended investigations, initiated and coordinated inquiries related to such investigations, reconciled worker's compensation payments with payments made by the City's health insurance carrier, and reported discrepancies where employees had received excessive benefits. In the present case, City Manager Buckley specifically denied that Wargin is a decision-maker or "gatekeeper" for the City's worker's compensation claims. On the contrary, Wargin's point-of-contact responsibilities require that she serve as the conduit for information that passes between the various parties who are involved in the worker's compensation process. In addition to the limited time it takes for Wargin to ferry this information between these parties, Wargin's lack of substantive interaction with the material, results in *de minimus* exposure to whatever confidential labor relations information that may be contained therein.

The City also argues that, to the extent that Wargin's opinions have been solicited in the past or will be solicited in the future with regard to worker's compensation matters, it would be impractical for the City to reassign this duty and it is not appropriate for the Commission to compel the City to deprive itself of Wargin's experience and expertise in this area. The City relies on NEENAH JOINT SCHOOL DISTRICT, DEC. NO. 24393-A (WERC, 4/02), to support this position. Our holding in that case, however, that it was not appropriate to compel the Neenah Joint School District to live without its Administrative Assistant's participation in collective bargaining matters, was based largely on the fact that the employee at issue actively participated in a full range of strategic discussions with the employer, including consultations regarding how to respond to grievances and what issues and proposals the District should pursue in collective bargaining.

Schultz has had informal conversations with Wargin regarding approximately two worker's compensation matters. Although Wargin has shared her opinion on such matters with Schultz, it never has been solicited. Further, she does not attend the meetings in which the City's strategy with regard to such matters is discussed. Wargin's limited participation in such conversations simply has been a far cry from the level of exposure at issue in NEENAH JOINT SCHOOL DISTRICT. Wargin's conversations with Schultz are much more akin to situations in which one-time discussions have resulted only in *de minimus* exposure to confidential labor relations information. See, e.g., MANITOWOC COUNTY, DEC. NO. 7116-C (WERC, 1/91).

City officials have used Wargin primarily as a sounding board, and we have consistently held that such interactions, even with regard to confidential labor relations matters, do not justify confidential status. GILLET SCHOOL DISTRICT, *supra*, GREEN COUNTY, *supra*; MOSINEE SCHOOL DISTRICT, DEC. NO. 20479-F (WERC, 8/02); SHEBOYGAN AREA SCHOOL DISTRICT, DEC. NO. 104988-B (WERC, 5/02). Further, as we have held in the past, to the extent that Wargin's exposure to confidential labor relations information comes from conversations with the City's officials, the City can easily enough limit her exposure by ending such conversations. HARTFORD UNION HIGH SCHOOL DISTRICT, DEC. NO. 23116-C (WERC, 6/06).

Finally, the City argues that Wargin's worker's compensation duties expose her to confidential labor relations information, because worker's compensation cases have the potential for giving rise to grievances or litigation. Although we have relied on litigation involvement when considering confidential status, *see, e.g.*, PIERCE COUNTY, DEC. NO. 9616-G (WERC, 10/92), there is no evidence in the record that Wargin has participated in preparation for such proceedings.

#### **CDL Drug Testing Duties**

Wargin's duties, as they pertain to the drug-testing of commercially-licensed (CDL) City drivers, require Wargin to verify for the City's drug testing company that individual CDL drivers continue to be employed by the City and to forward lists, identifying those to be tested, to the appropriate City department heads or their designees. This activity takes Wargin approximately five minutes per annual quarter. After receiving the lists, City department heads take responsibility for administering the testing program. Forwarding the testing list exposes Wargin to confidential labor relations information, but the amount of time needed to perform this duty is *de minimus*.

The City relies on CITY OF DE PERE, to support its contention that Wargin's involvement with the CDL drug testing program justifies confidential status. The employee in CITY OF DE PERE, however, was responsible for independently administering the entire drug-testing program, including establishing the specific dates and times when individual employees would be tested. Similarly, in the CITY OF WAUSAU, DEC. NO. 20916-F (WERC, 5/98), where we also found an administrative specialist's duties related to a CDL drug testing program to require confidential status, that employee had responsibility for administering all aspects of the drug testing program independently, because she was the only non-licensed and, thus, non-tested employee working in the transit system. As with her worker's compensation duties, Wargin is a conduit for information related to the City's drug-testing program, rather than the administrator for that program.

#### **Assisting the Finance-Administrative Services Director**

The City also generally asserts that Wargin is a confidential employee because she provides administrative assistance to Finance-Administrative Services Schultz when he performs his duties as Personnel Director. However, because the record establishes that the



City Manager is the *de facto* Personnel Director responsible for the day-to-day administration of collective bargaining agreements, Wargin has performed little if any of the confidential labor relations work that might traditionally be associated with working for a personnel director. Indeed, even as to the confidential labor relations work Schultz does perform when costing bargaining proposals and serving on the City's bargaining teams, said work has not generated any confidential labor relations work for Wargin. Thus, this City assertion is not persuasive.

### **Future Duties**

The City argues that Schultz intends to increase his utilization of Wargin's administrative assistance in such a way that her prospective exposure to confidential labor relations information justifies her exclusion from the collective bargaining unit. The Union argues, in response, that the Commission must view this future increase in Wargin's duties as speculative and, therefore, not appropriate for consideration in determining whether Wargin should be deemed a confidential employee. The Commission has held that a conclusion regarding confidential status can be based on an employer's good faith assertions as to what will happen in the future, though it will not be based on duties and responsibilities that are too speculative to warrant consideration. CLARK COUNTY, DEC. NO. 16648-B (WERC, 6/04); CHIPPEWA COUNTY, DEC. NO. 10497-A (WERC, 8/97). We find the City's assertions are not speculative and are made in good faith. Thus, when deciding whether Wargin is a confidential employee, we have considered the ways in which the City anticipates Wargin's exposure to confidential labor relations information will increase.

Schultz anticipates having Wargin copy and distribute his financial analyses of bargaining proposals (duties Schultz presently performs himself) to the appropriate City representatives. Although it is anticipated that Schultz will continue to perform the analytical work necessary to compile such documents, Wargin also may be asked to proofread his work, for the purpose of assuring that data has been entered accurately. We find that such activities will take a *de minimus* amount of time. Such responsibilities only occur during periods of bargaining and even then are very limited in terms of the amount of time needed to perform same.

The City relies on HOWARD-SUAMICO SCHOOL DISTRICT, DEC. NO. 22731-A (WERC, 9/88), for the proposition that an employee with access to costing materials should be deemed confidential. However, the controller/computer coordinator in HOWARD-SUAMICO SCHOOL DISTRICT was not excluded from the bargaining unit because he had access to costing materials, but rather because he was responsible for determining the costs and impacts associated with various proposals. We consistently have recognized the confidential status of employees who are actually responsible for determining the costs of wage and fringe benefit proposals, *see, e.g.*, HARTFORD UNIFIED SCHOOL DISTRICT, *supra*, GILLET SCHOOL DISTRICT, *supra*, NEENAH JOINT SCHOOL DISTRICT, *supra*, THE CITY OF DE PERE, *supra*, HOWARD-SUAMICO SCHOOL DISTRICT, *supra*. Wargin will not have this responsibility.

Schultz also contemplates having Wargin type correspondence, open mail and file collective bargaining related matters. Because Schultz's duties do not involve him in any significant way in the day-to-day administration of any collective bargaining agreements, typing correspondence, opening mail and filing would produce only a minimal increase in exposure to confidential labor relations matters and then primarily only when bargaining is ongoing.

The City also has indicated that it has contemplated moving City personnel files to the Finance Office and putting them under Wargin's care. As we explained above, the duty to maintain personnel files simply does not confer confidential status because the information contained therein is accessible to the union representing the employees or to the employee him or herself.

Given all of the foregoing, the new duties the City proposes to have Wargin perform would not significantly increase the time she would spend performing confidential labor relations work and do not in and of themselves warrant confidential status.

### **Reassignment of Duties**

We have concluded that Wargin's current and future confidential labor relations duties will take only a *de minimus* amount of time. However, as we held in MINERAL POINT SCHOOL DISTRICT, *supra*, even where the amount of confidential labor relations work is not significant, the employee providing clerical support to a management employee who has significant labor relations responsibilities (such as Schultz) will be found to be confidential, unless the work can be reassigned without undue disruption to the employer's operations. We turn to a consideration of whether Wargin's current and/or future confidential labor relations duties could be so reassigned.

In the present case, the City already has four confidential employees, all of whom work in relatively close proximity to Schultz's office. The Administrative Assistant for the City Manager, whose office is located one floor away from Schultz's office and who already performs the vast majority of confidential work for the City, is a confidential employee. Aside from the City Manager's Administrative Assistant, there is another confidential employee located in the same building complex, a confidential employee across the street from Schultz's office, and another confidential employee one-half mile away from Schultz's office. City Manager Buckley has acknowledged that it is possible to shift Wargin's work – including her worker's compensation tasks – to these other employees, and he has acknowledged that he has supervisory authority to ask his own Administrative Assistant to put aside other work for the purpose of giving immediate attention to confidential labor relations work. He also has recognized the availability of call-forwarding and e-mail to facilitate the absorption of Wargin's work by other employees. Although the City asserts that any shifting of work duties would be disruptive because the other confidential City employees are busy, we find that the relatively small amount of work that would be transferred away from Wargin is simply not enough to present an undue burden to City operations.

In reaching this conclusion, we acknowledge that Wargin has gained some expertise in performing her worker's compensation tasks and that these duties, therefore, would be more difficult to reassign than others. However, given the very minimal exposure to confidential labor relations information that such duties provide, the City may well decide that Wargin can retain her worker's compensation duties despite her bargaining unit status rather than reassigning same to other confidential employees. We also acknowledge that Schultz identified a comfort level with Wargin as to her proposed proofreading of costing documents. While Schultz's confidence in Wargin is no doubt warranted, the record does not provide any objective evidence that would indicate that other confidential employees will be unable to perform this duty.

### Conclusion

Given the foregoing, we conclude that Wargin is not a confidential employee, and the bargaining unit is clarified to include her position.

Dated at Madison, Wisconsin, this 14th day of November, 2006.

### WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

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Judith Neumann, Chair

Paul Gordon /s/

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Paul Gordon, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

